83-1004

Docket No.

Office - Supreme Court, U.S.
FILED
DEC 14 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

In the Matter of
COPY-DATA SYSTEMS, INC.,
Bankrupt.

TOSHIBA AMERICA, INC.,
Petitioner,

—against—

COPY-DATA SYSTEMS, INC. and ELLIOT SCHER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN J. WITMEYER III
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Counsel for Petitioner

Of Counsel:

CHARLES A. BOOTH
FORD MARRIN ESPOSITO & WITMEYER
120 Wall Street
New York, New York 10005

December 14, 1983

Questions Presented For Review

1. When a trustee in bankruptcy elects to pursue a suit and has judgment rendered and costs taxed against him, must the trustee pay those costs (consistent with a rule of law established by this court and unassailed for over 100 years), or instead is the Third Circuit correct that the trustee should now for the first time be held to be immune from such customary risks of litigation?

2. Must a trustee in bankruptcy treat all claims equally that are in the same category of claims (as trustees have always been required to do under the bankruptcy laws), or instead is the Third Circuit correct that trustees may now for the first time arbitrarily choose certain administrative expenses to pay in full, and others to leave totally unpaid?

Statement Pursuant to Supreme Court Rule 28.1

Toshiba Corporation, Parent Company of Toshiba America, Inc.

Consolidated Subsidiaries of Toshiba Corporation:

Toshiba Electric Equipment Corp.
Onkyo Corporation
Toshiba Battery Co., Ltd.
Toshiba Heating Appliances Co., Ltd.
Toshiba Electric Appliances Co., Ltd.
Toshiba Engineering & Construction Co., Ltd.
Shibaura Engineering Works Co., Ltd.
Nishishiba Electric Co., Ltd.
Kitashiba Electric Co., Ltd.
Toshiba International Corporation
Toshiba Medical Systems Co., Ltd.
Toshiba Business Machine Co., Ltd.
Tokyo Electric Co., Ltd.
Toshiba Electronic Systems Co., Ltd.
Marcon Electronic Co., Ltd.
Toshiba Components Co., Ltd.
Toshiba Machine Co., Ltd.
Toshiba Seiki Co., Ltd.
Toshiba Steel Tube Co., Ltd.
Tokyo Optical Co., Ltd.
Toshiba Ceramics Co., Ltd.
Toshiba Tungaloy Co., Ltd.
Toshiba Chemical Products Co., Ltd.
Toshiba Silicone Co., Ltd.
Toshiba Glass Co., Ltd.
Toshiba Cold Chain Co., Ltd.
Toshiba House and Living Industry Co., Ltd.
Toshiba Credit Corporation
Toshiba Physical Distribution Co., Ltd.
Toshiba Shoji Co., Ltd.
Nikko Jitsugyo Co., Ltd.

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IN THE

Supreme Court of the United States

October Term, 1983

Docket No.

In the Matter of

COPY-DATA SYSTEMS, INC.,

Bankrupt.

TOSHIBA AMERICA, INC.,

Petitioner,

—against—

COPY-DATA SYSTEMS, INC. and ELLIOT SCHER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Toshiba America, Inc. ("TAI"), petitioning for the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit, respectfully shows:

Decisions Below

The decisions of the United States Court of Appeals for the Third Circuit, of the United States District Court for the District of New Jersey, and the United States

Bankruptcy Court for the District of New Jersey, are all unreported. Copies of all of the opinions are appended.

Basis of Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254. The judgment sought to be reviewed was entered by the Clerk of the United States Court of Appeals for the Third Circuit on September 15, 1983. This petition for a writ of certiorari is timely filed within the prescribed ninety day period.

Statutory Provisions Involved

The statutory provisions involved on this appeal are produced in full text in Appendix "D". Those provisions are §§ 62(a)(1) and 64(a) of the Bankruptcy Act of 1898 as amended (formerly 11 U.S.C. §§ 102(a)(1) and 104(a)) and § 403 of the Bankruptcy Act of 1978, 11 U.S.C. prec. 101 note (1979).

Statement of the Case

The Trustee (defendant Elliot Scher) on behalf of the estate of The Bankrupt (defendant Copy-Data Systems, Inc.), has, over the last eight years, pursued alleged antitrust claims against TAI in the United States District Court of the Southern District of New York. From time to time as he pursued that suit, the Trustee applied to the United States Bankruptcy Court for the District of New Jersey for orders authorizing him to use the assets of the bankrupt's estate to fund the litigation as administrative expenses; the bankruptcy court routinely granted those applications.

The result of all this litigation was a ruling by the United States Court of Appeals for the Second Circuit, after a full trial in the lower court, that the alleged antitrust claims so vigorously pursued by the Trustee—both as

urged by him at trial and as alleged in the Bankrupt's Complaint—failed even to state any viable antitrust claim against TAI, even if everything the Trustee claimed was deemed true. *See Copy-Data Systems, Inc.* v. *Toshiba America, Inc.*, 663 F.2d 405 (2d Cir. 1981) .

In completely dismissing the Bankrupt's antitrust claims, the Second Circuit awarded TAI costs on appeal, which were taxed in the aggregate sum of $16,747.07, in accordance with Fed. R. App. P. 39. All of these costs have been due and payable since January 26, 1982.

On the same day that costs were taxed, TAI filed its Proof of Claim for the payment of the taxed costs as an administrative expense of the estate, just as the Trustee had up until then funded the litigation against TAI through supposed "administrative expenses." The Trustee refused to pay those costs, and refused even to entertain TAI's formal application for payment under Fed. R. Bankr. P. 219 & 901(4).

Proceedings in Bankruptcy Court

On March 19, 1982, TAI commenced proceedings against the Trustee in the bankruptcy court to compel payment of the lawfully taxed costs.* The Trustee opposed, arguing that because he had already exhausted the estate (in futilely prosecuting the antitrust suit against TAI), and because he would not accept his own personal liability for those costs, TAI had no remedy. The bankruptcy court denied TAI's motion on September 21, 1982 based upon a letter opinion it had rendered on September 1, 1982.

---

* As a proceeding in or relating to a case commenced under the Bankruptcy Act of 1898 as amended, the Bankruptcy Court had jurisdiction over the proceeding pursuant to Bankruptcy Act of 1898 § 2, and Bankruptcy Act of 1978, § 403(a), 11 U.S.C. prec. 101 note (1979).

Proceedings in the District Court

On appeal, the district court held that TAI's lawfully taxed costs constituted a proper administrative expense of the Bankrupt's estate. However, unlike the administrative expenses allowed to the Trustee to fund the groundless antitrust litigation in the first place, the district court ruled that this particular expense need not be paid.

Proceedings in the Court of Appeals

TAI then appealed to the United States Court of Appeals for the Third Circuit, arguing primarily that (1) under clear precedent of the United States Supreme Court, a trustee in bankruptcy, just like any other litigant who elects to pursue a suit, and has judgment rendered and costs taxed against him, must pay those costs, and (2) the whole concept for the bankruptcy system has always been that the trustee must equally treat all claims within a given category of claim (*e.g.*, all "administrative claims").

The court of appeals affirmed the judgment of the district court without opinion.

REASONS FOR ALLOWING THE WRIT

1. The Decisions of the Courts Below Conflict With a Decision in This Court.

The courts below have ruled that a trustee in bankruptcy, who elects to pursue a suit and has judgment rendered and costs taxed against him, is somehow exempt from having to pay those costs. But the Supreme Court of the United States addressed the question long ago and stated that "of course, he is liable" for those costs. *Norton* v. *Switzer*, 93 U.S. 355, 366 (1876). Since then, this has

been the law which governed in those rare cases when a trustee refused to pay. *Accord, Babbitt* v. *Read*, 236 F. 42 (2d Cir. 1916), *cert. denied*, 243 U.S. 648 (1917) (Learned Hand, C.J.).

But the lower courts in this case have abrogated that rule, and created in its place a new rule that trustees bear none of the customary risks of litigation—not even liability for lawfully taxed costs. This is an extremely false and dangerous proposition, and is directly contrary to law that has been established by this Court and has been unassailed for over 100 years.

Indeed, there has been no question until now that a trustee in bankruptcy personally answers for expenses incurred by him in his administration of the estate. *See* 3A Collier on Bankruptcy § 62.09, at 1446 (1975). To obtain reimbursement for such costs, the trustee must justify them to the court. *See* Bankruptcy Act of 1898, § 62(a)(1); 11 U.S.C. § 503(b) (Supp. 1979). If the court approves the costs, then the trustee may be *reimbursed* from the estate; if the court disapproves the costs, the trustee will not be reimbursed. *Id.* It is that simple. But in the Third Circuit, that system is now negated by one of absolute immunity of the trustee, which finds no support in the law.

2. The Decision Below Vastly Deviates From the Accepted and Well Established Policy Underlying the Bankruptcy.

The whole structure of bankruptcy law calls for all claims within a category of claims (*e.g.*, all "administrative claims") to be treated equally. The lower courts, however, in this case have made a radical departure from that established and basic rule of law. Those courts have allowed this trustee to pay (in full and on a current

basis) his own lawyers, who are administrative claimants, and to leave other administrative claimants to share (perhaps years down the road) in whatever (if anything) the trustee ultimately leaves in the estate.

This is an unprecedented power to bestow upon trustees in bankruptcy, and is a power that runs counter to the whole structure of the bankruptcy law. *In re Columbia Ribbon Co.*, 119 F.2d 999 (3d Cir. 1941).

If these improper rulings (and the ruling of immunity from lawfully taxed costs) are not reversed, trustees in bankruptcy (at least in the Third Circuit) will have vast and unbridled powers that they never before enjoyed—powers indeed that the United States Supreme Court and the Courts of Appeals have expressly denied trustees in the past.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Counsel for Petitioner

Of Counsel:

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December 14, 1983

APPENDICES

Appendix "A"

Judgment Order of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 83-5050

In the matter of:

COPY-DATA SYSTEMS, INC.,

Debtor,

TOSHIBA AMERICA, INC.,

Appellant,

—v.—

COPY-DATA SYSTEMS, INC.,

(Civil No. 82-3525—D.N.J.—Newark)
District Judge: Honorable Clarkson S. Fisher
Submitted Under Third Circuit Rule 12(6)
September 14, 1983

Before: SEITZ, Chief Judge, GIBBONS and ROSENN, Circuit Judges.

Judgment Order

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Cost taxed against appellant.

By the Court,
(SEITZ)

/s/ COLLINS J. SEITZ

.....

Chief Judge

ATTEST:

/s/ SALLY MAYOS

.....

SALLY MAYOS, Clerk

DATED: SEP 15 1983

Certified as a true copy and issued in lieu
of a formal mandate on October 7, 1983.

Test: M ELIZABETH FERGUSON

Chief Deputy Clerk, United States Court of Appeals
for the Third Circuit

Appendix "B"

Order and Opinion of the District Court

ORDER AFFIRMING BANKRUPTCY ORDER OF SEPTEMBER 21, 1982

Cole, Schotz, Bernstein,
Meisel & Forman
A Professional Corporation
365 West Passaic Street
Rochelle Park, New Jersey 07662
(201) 368-0100
Attorneys for Elliot Scher,
Trustee for Copy-Data Systems Inc., Bankrupt

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 82-3525 F

TOSHIBA AMERICA, INC.,
Plaintiff-Appellant,

vs.

COPY-DATA SYSTEMS, INC.,
Defendant-Appellee.

Plaintiff-Appellant, Toshiba America, Inc. (TAI), having appealed from an Order of the United States Bankruptcy Court for the District of New Jersey (1) requiring TAI to await its proportionate share of recovery of certain administrative expenses until final distribution of the estate of the defendant, Copy-Data Systems, Inc. (Copy-Data), and (2) finding that the trustee of the bankrupt estate is not personally liable for the aforementioned costs; and, this Court having reviewed the report and considered the briefs and argument of counsel; and, for the reasons stated in this Court's opinion filed December 7, 1982;

It is, on this 15th day of December 1982,

ORDERED, that the Bankruptcy Court's Order of September 21, 1982 (1) requiring plaintiff-appellant,

Toshiba America, Inc. to await its proportionate share of recovery of certain administrative expenses until final distribution of the estate of the defendant, Copy-Data Systems, Inc., and (2) finding that the trustee of the bankruptcy estate is not personally liable for the aforementioned costs be and hereby is affirmed in all respects.

No costs.

/s/ CLARKSON S. FISHER

.....

HON. CLARKSON S. FISHER, U.S.D.C.J.

OPINION

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 82-3525

TOSHIBA AMERICA, INC.,
Plaintiff-Appellant,

—v.—

COPY-DATA SYSTEMS, INC.,
Defendant-Appellee.

Appearances: WILLIAM P. FORD, ESQ.
By: CHARLES A. BOOTH, ESQ.
35 North Fullerton Avenue
Montclair, NJ 07042

(Attorney for Plaintiff)

COLE, SCHOTZ, BERNSTEIN,
MEISEL & FORMAN, P.C.
By: MICHAEL S. MEISEL, ESQ.
STEVEN R. KLEIN, ESQ.
365 West Passaic Street
Rochelle Park, NJ 07662

(Attorney for Defendant)

FISHER, Chief Judge.

Plaintiff-appellant, Toshiba America, Inc. (TAI), appeals from an order of the United States Bankruptcy Court for the District of New Jersey (1) requiring TAI to await its proportionate share of recovery of certain administrative expenses until final distribution of the estate of the defendant, Copy-Data Systems, Inc. (Copy-Data), and (2) finding that the trustee of the bankrupt estate is not personally liable for the aforementioned costs. For the reasons stated herein, the order of the bankruptcy court is upheld.

On May 23, 1975, Copy-Data commenced an action in the United States District Court for the Southern District of New York against TAI. Copy-Data based its claims on both the state-law tort and federal-law anti-trust principles. After the institution of that suit, an involuntary petition in bankruptcy was filed against Copy-Data and Elliot Scher was appointed trustee.

The trustees elected to pursue the bankrupt's claim against TAI. After trials on liability and damages, the district court awarded treble damages in the amount of $1,320,000. On appeal, the court of appeals reversed the district court's ruling with respect to the anti-trust claims. The state-law claims were remanded to the district judge for further consideration and are now pending.

As a result of the appeal process involving the anti-trust issues, costs were taxed against the bankrupt estate in the amount of $16,747.07. TAI brought a motion in bankruptcy court to obtain immediate payment of these costs, as administrative priority expenses, and to surcharge the trustee personally in the event that there were insuffiicent monies in the bankrupt estate to pay the taxed costs.

On September 21, 1982, the bankruptcy court (DeVito, B.J.) denied TAI's motion, ordering that, although the costs were administrative expenses, TAI must await its proportionate share of recovery upon final distribution of the estate. The court found that, neither at the instant of bankruptcy nor at any instant prior to the pro rata distribution to creditors of the assets of the bankrupt estate, is any creditor entitled to receive or demand payment of a claim from the trustee. In addition, Judge DeVito stated that there was no showing that the litigation was conducted vexatiously, wantonly or in bad faith as to warrant holding the trustee personally liable.

The defendant-appellee contends that the bankruptcy court's order of September 21, 1982, should not be upset by this court. It argues that it is interlocutory in nature and thus its appealability under the Bankruptcy Act is committed to the discretion of this court. *See* section 39(c) Bankr. Act, 11 U.S.C. § 67. In making the determination whether an order is interlocutory or final in nature, the effect of the order must be analyzed. An order is considered to be final when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *In re Geiger Enterprises, Inc.*, 17 B.R. 432 (W.D.N.Y. 1982); *Catlin* v. *United States*, 324 U.S. 229, 233 (1945).

The facts of this case indicate that the September 21 order is not interlocutory in nature. Implementation of this order will determine, with finality, the issues of the trustee's liability and the rights to collection of costs. These findings will not affect or disrupt the litigation still pending in the state and bankruptcy courts.

The defendant further contends that the order of the bankruptcy court should not be upset unless it is clearly erroneous. It is true that the clearly erroneous test applies only to findings of fact. This court must independently determine the accuracy of the bankruptcy's court's legal conclusions. I find that both are sound.

After reviewing the decision in *Copy-Data Systems, Inc.* v. *Toshiba America, Inc.*, 663 F.2d 405 (2d Cir. 1981), it is clear that the Second Circuit reversed the district court on a close question of anti-trust law. There is no evidence that the trustee brought the litigation in bad faith. The general rule is that trustees are liable only for actions beyond the scope of their authority or for negligence while acting within their authority. *In the Matter of Charles R. Turner* v. *Millard Aviation, Inc.*, 13 B.R. 15 (D. Neb. 1981). A trustee must exercise reasonable diligence in the performance of his duties in administering the bankrupt's estate. *Carson, Pirie, Scott*

& *Co.* v. *Turner*, 61 F.2d 693, 694 (6th Cir. 1932). The standard or measure of care required is that of an ordinarily prudent person in the conduct of his private business under similar circumstances and with a similar goal. *In re Schwen's Inc.* v. *Lovett*, 19 B.R. 681, *aff'd*, 20 B.R. 638 (D. Minn 1982) There is no evidence that the trustee failed to satisfy this standard.

The next question is whether the taxed costs, which are concededly administrative expenses, may be demanded by TAI for immediate payment. The bankruptcy court has the authority to place conditions upon the payment of such costs. The court has ordered that TAI must await its proportionate share of recovery until final distribution of the estate. I find no error in the bankruptcy court's findings and will not disrupt its order. Accordingly, the bankruptcy court's order of September 21, 1982, is upheld. Defendant-appellee will submit an order within 10 days. No costs.

December 7, 1982.

Appendix "C"

Order and Letter Opinion of the Bankruptcy Court

ORDER DENYING TOSHIBA'S MOTION FOR ORDER DIRECTING PAYMENT OF ADMINISTRATIVE EXPENSE

Cole, Schotz, Bernstein,
Meisel & Forman
A Professional Corporation
365 West Passaic Street
Rochelle Park, New Jersey 07662
(201) 368-0100
Attorneys for
Copy-Data Systems, Inc., Bankrupt

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW JERSEY

No. B-76-2082

In Bankruptcy

In the Matter of

COPY-DATA SYSTEMS, INC.,

Bankrupt.

THIS MATTER having been opened to the Court by Toshiba America Inc. for entry of an Order: (a) Directing the Trustee to pay to Toshiha America Inc. the sum of $16,747.07, representing costs taxed against the Bankrupt by the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York; (b) Directing the Trustee to pay the same personally if the funds of the estate are insufficient to do so; and (c) Granting such other and further relief as may be just and proper; and, the Court having read and considered the moving and opposing papers and the argument of counsel; and, for the reasons stated in its letter opinion dated September 1, 1982;

It is, on this 21st day of September 1982,

ORDERED, that the subject costs are administrative expenses, but that movant must await its proportionate share of recovery upon final distribution; and, it is further

ORDERED, that the Trustee shall not be personally liable for all or any part of the aforesaid administrative claim.

/s/ D. JOSEPH DE VITO
HON. D. JOSEPH DE VITO
Bankruptcy Judge

LETTER OPINION

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW JERSEY

U. S. Court House & Post Office Building

Newark, New Jersey 07102

201 645-2630

D. JOSEPH DE VITO
BANKRUPTCY JUDGE

September 1, 1982

Michael S. Meisel, Esq.
Cole, Schotz, Bernstein, Meisel & Forman
365 West Passaic St.
Rochelle Park, N. J. 07662

William P. Ford, Esq.
35 North Fullerton Ave.
Montclair, N. J. 07042

Gentlemen:

Re: Copy-Data Systems, Inc.—Toshiba America, Inc.
No. B-76-2082

Toshiba America, Inc. (TAI) moves for an order (1) directing the trustee to pay to TAI forthwith the sum of $16,747.07 representing costs heretofore taxed against the bankrupt by the Untied States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York; and (2) directing the trustee to pay the same personally if the funds of the estate are insuffiicent to do so.

The issue at bar is, firstly, whether such taxed costs are administrative expenses; secondly, whether such expenses are to be paid immediately, as contended by TAI, or upon distribution of the bankrupt estate, as argued by the trustee; and thirdly, in the event the estate is

inadequate to satisfy such claims, whether the trustee is personally liable therefor.

This Court holds that subject costs arising from the proceedings in the admiistration of the estate are, indeed, administrative expenses within the purview of the statute; *see* § 62a of the Bankruptcy Act of 1898, 11 U.S.C. § 102a; *see also In re Kyte*, 189 F. 531 (D. Pa. 1911).

The Court further finds that neither at the instant of bankruptcy nor at any instant prior to the pro rata distribution to creditors (including administrative claimants) of the assets of the bankrupt estate is any creditor (as distinguished from the trustee, who represents the estate) entitled to receive or to demand from the trustee payment of a fixed claim, *see B & L Farms Co.* v. *United States*, 368 F.2d 571, 572 (5th Cir. 1966) (per curiam) (Brown, J., dissenting), *cert. denied*, 389 U.S. 835 (1967).

Various state law claims asserted by the trustee against TAI are still in litigation. To award TAI its claimed costs now, while the ultimate surplus, if any, from the estate is still in doubt would be premature and very possibly prejudicial to other administrative claimants who, like TAI, must await their proportionate share of recovery upon distribution. This is basic. TAI has neither alleged nor shown that it will be prejudiced in any way as a result thereof.

Finally, the Court holds that the trustee is not personally liable. There has been no showing that the litigation in question was conducted vexatiously, wantonly, or in bad faith. Indeed, the Southern District granted judgment in favor of the trustee and against TAI, reversed on appeal. There is absolutely no evidence that the trustee has exceeded his statutory authority. This Court finds, to the contrary, that the trustee has done nothing more than to discharge his obligations of proper administration and liquidation of the estate, pursuant to

§ 70a of the Bankruptcy Act, 11 U.S.C. § 110a (repealed October 1, 1979).

Accordingly, for all the foregoing reasons, TAI's motion is denied. Submit an Order in accordance therewith.

Very truly yours,

D. JOSEPH DE VITO
Bankruptcy Judge

Appendix "D"

Statutory Provisions Involved

Section 62a(1) of the Bankruptcy Act of 1898, July 1, 1898, 30 Stat. 562, as amended, provides as follows:

EXPENSES OF ADMINISTERING ESTATES; UNAUTHORIZED SHARING OF FEES; WITHHOLDING ALLOWANCES.
a. (1) The actual and necessary costs and expenses incurred by officers, other than referees, in the administration of estates shall, except where other provisions are made for their payment, be reported in detail under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

Section 64(a) of the Bankruptcy Act of 1898, July 1, 1898, 30 Stat. 563, as amended, provides as follows:

DEBTS WHICH HAVE PRIORITY. a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary and expense fund; the filing fees paid by creditors in involuntary cases or by persons other than the bankrupts in voluntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, is recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expense of the recovery; the trustee's expenses in opposing the bankrupt's discharge or in connection with the criminal prosecution of an offense punishable under chapter 9 of title 18 of the United States Code, or an offense concerning the business or property of the bankrupt punishable under other laws, Federal or State; the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys

employed, to the bankrupt in voluntary and involuntary cases, and to the petitioning creditors in involuntary cases, and if the court adjudges the debtor bankrupt over the debtor's objection or pursuant to a voluntary petition filed by the debtor during the pendency of an involuntary proceeding, for the reasonable costs and expenses incurred, or the reasonable disbursements made, by them, including but not limited to compensation of accountants and appraisers employed by them, in such amount as the court may allow. Where an order is entered in a proceeding under any chapter of this Act directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding, including expenses necessarily incurred by a debtor in possession, receiver, or trustee in preparing the schedule and statement required to be filed by section 238, 378 or 483, shall have priority in advance of payment of the unpaid costs and expenses of administration, including the allowances provided for in such chapter, incurred in the superseded proceeding and in the suspended bankruptcy proceeding, if any; (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; and for the purposes of this clause, the term "traveling or city salesman" shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract; (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced re-

sulting in the conviction of any person of an offense under Chapter 9 of Title 18 of the United States Code, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof which are not released by a discharge in bankruptcy: *Provided, however,* That no priority over general unsecured claims shall pertain to taxes not included in the foregoing priority: *And provided further,* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court; and (5) debts other than for taxes owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law or who is entitled to priority by paragraph (2) of subdivision c of section 67 of this Act: *Provided, however,* That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy.

Section 403(a) of the Bankruptcy Act of 1978, November 6, 1978, 92 Stat. 2682, codified at 11 U.S.C. prec. 101 note (1979) provides as follows:

A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

Certificate of Service

The undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that on this day three copies of the foregoing Petition have been served upon:

Cole, Schotz, Bernstein
Meisel & Forman
A Professional Corporation
365 West Passaic Street
Rochelle Park, New Jersey 07662

by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record at their post office address as shown above. I further certify that all parties required to be served have been served.

Dated: December 14, 1983.

.....

JOHN J. WITMEYER III

Sworn to before me
this 14th day of
December, 1983

.....

Notary Public